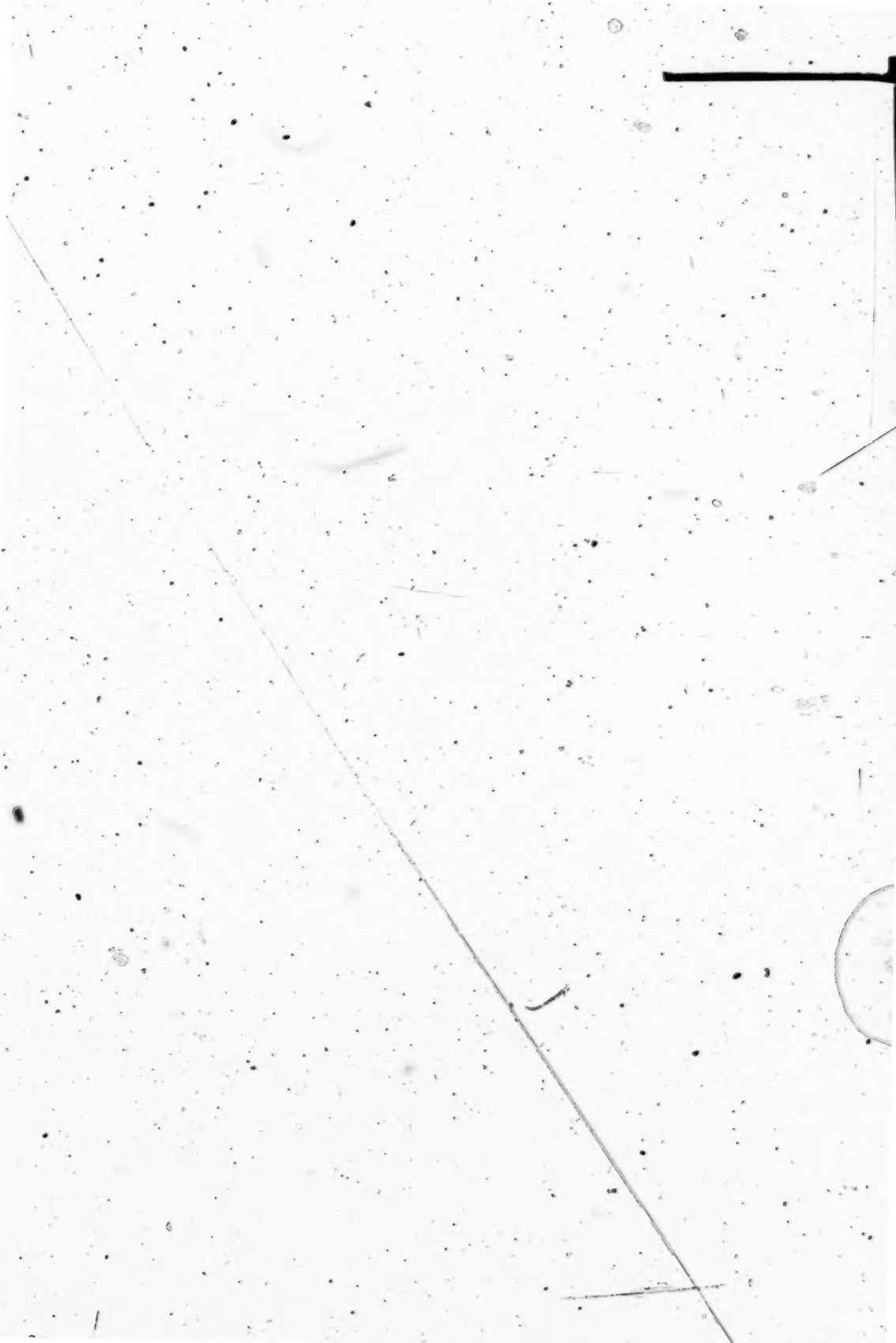

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No. 714

In the Supreme Court of the United States

OCTOBER TERM, 1959

DAVID W. ERICKSON, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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Cases:

Dolcin Corp. v. *Federal Trade Commission*, 219 F. 2d 742, certiorari denied, 348 U.S. 981 — 5

Federal Trade Commission v. *Sewell*, 353 U.S. 969, reversing 240 F. 2d 228 — 4–5

Independent Directory Corp. v. *Federal Trade Commission*, 188 F. 2d 468 — 5

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 20–26) is reported at 272 F. 2d 318. The opinion and order of the Federal Trade Commission (Pet. App. 123–142) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 19, 1959 (Pet. 17), and the final decree of that court was entered on January 6, 1960 (Pet. 18–19). The petition for a writ of certiorari was filed on February 17, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the findings of the Federal Trade Commission are supported by substantial evidence.

2. Whether the Hearing Examiner improperly restricted petitioner's presentation of evidence or his right to cross-examination.

STATUTE INVOLVED

The pertinent provisions of the Federal Trade Commission Act (38 Stat. 717, as amended by 52 Stat. 114, 15 U.S.C. 52) are as follows:

> SEC. 12(a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—
>
> (1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or
>
> (2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.

* * * * *

STATEMENT

After full administrative proceedings, the Federal Trade Commission held that petitioner had violated Section 12 of the Federal Trade Commission Act by disseminating false advertisements of cosmetic and medicinal preparations used in hair and scalp treatment, and issued a cease-and-desist order (Pet. App.

123–142).[1] The court of appeals unanimously affirmed (Pet. 20–26). It held that the Commission's findings were supported by substantial evidence, that its order was not too broad, and that no prejudicial error was committed by the examiner in the conduct of the hearings (*ibid.*).

From his principal place of business in Chicago, Illinois, petitioner distributes to purchasers outside of Illinois, home treatment kits of various cosmetic and medicinal preparations designed for external use in the prevention of baldness, the growing of hair, and the elimination of certain scalp disorders (Pet. App. 124). In the course of his business, petitioner or his representatives visit various cities throughout the United States for the purpose of conducting so-called hair and scalp "clinics" (Pet. App. 126). Prior to each visit, petitioner places advertisements in a local newspaper inviting prospective customers to call on him for free consultation and advice about their hair and scalp problems (*ibid.*). A substantial number of such newspapers are distributed in interstate commerce and by the United States mails (Pet. App. 128). Of those responding to his advertisements, petitioner accepts about 95% for treatment, and sells them one of his home treatment kits which is mailed from the Chicago office (Pet. Opp. 127).

The Commission, adopting the examiner's initial decision (Pet. App. 142), found that by describing himself in his promotional material as a "trichologist,"

[1] "Pet. App." refers to the printed appendix to petitioner's brief and "Resp. App." to the printed appendix to respondent's brief in the court below.

petitioner falsely represented he has had competent medical training in the treatment of scalp disorders affecting the hair (Pet. App. 137–138); that petitioner's advertisements falsely represented that the use of his preparations would permanently eliminate dandruff and irritations of the scalp (Pet. App. 138); and that petitioner's representations that he could prevent or overcome baldness were false when not limited to cases other than "male pattern baldness" (*ibid.*), which condition accounts for the vast majority of all cases of baldness (Resp. App. 16).

ARGUMENT

Petitioner raises two issues: (1) that the Commission's findings are not supported by substantial evidence, and (2) that the hearing examiner improperly restricted petitioner's presentation of evidence and his right of cross-examination (Pet. 6–15). Both of these contentions were correctly rejected by the court of appeals, and neither presents an issue warranting further review.

1. The claim of lack of substantial evidentiary support for the findings is based on the fact that petitioner produced a number of customers who testified that they had not been deceived by petitioner's advertisements, and that they were satisfied with the results of his treatments. There was, however, expert medical testimony that petitioner's therapeutic claims and his use of the term "trichologist" were false. The weighing of the evidence is, of course, for the Commission, and the latter is not required to reject otherwise credible expert medical opinion merely because of the testimony of satisfied lay users. *Federal Trade*

Commission v. *Sewell*, 353 U.S. 969, reversing 240 F. 2d 228 (C.A. 9); see *Independent Directory Corp.* v. *Federal Trade Commission*, 188 F. 2d 468, 471 (C.A. 2); *Kalwajtys* v. *Federal Trade Commission*, 237 F. 2d 654, 656 (C.A. 7), certiorari denied, 352 U.S. 1025.

2. Petitioner's attack on the examiner's conduct of the hearing is equally without merit. It involves such things as the examiner's refusal to permit petitioner's counsel to continue a line of questioning that the examiner deemed improper, without awaiting objection to the particular question by Commission counsel; the examiner's comment that the author of a treatise petitioner intended to use on cross-examination, had, to the examiner's knowledge, subsequently changed his position (Pet. App. 38–39); and the refusal to allow petitioner to testify as an "expert" in the absence of an adequate showing of his qualifications. These contentions were all "carefully considered" by the court below and found to be "without merit" (Pet. 26).

Contrary to petitioner's argument (Pet. 14), the examiner did not depart from the rule laid down in *Reilly* v. *Pinkus*, 338 U.S. 269, in refusing (Pet. App. 52–53) to permit the use of a treatise in cross-examination of a Commission expert witness. For here the witness had not substantially based his direct testimony upon "knowledge [which] was acquired from medical text books and publications" (*Reilly* v. *Pinkus*, *supra*, at 275). See *Dolcin Corp.* v. *Federal Trade Commission*, 219 F. 2d 742, 746–47 (C.A.D.C.) certiorari denied, 348 U.S. 981. And in any event the court below, as had the court in *Dolcin*, *supra*, found "no

prejudicial error in the challenged rulings of the Hearing Examiner" (Pet. 26). This ruling was clearly correct in view of the fact that the treatise sought to be used in examining the Commission expert dealt with the basic cause of baldness—a matter not significantly in issue in the instant case.

CONCLUSION

The decision below is correct and no questions calling for further review are presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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